THE JUDICIARY – A "BARRISTER'S EYE" VIEW

R.V. GYLES*

There are signs that the status and prestige of the judiciary are declining. There will be many iconoclasts and "pop" sociologists who think this is a good thing. In this country there is no shortage of people who have a desire to tear down tall poppies. I do not agree.

The purpose of the judicial system is to settle disputes and differences in the community which cannot be settled by other means. It is necessary that there be a verdict to settle these disputes or differences which is accepted both by the parties and the community. This does not mean that particular decisions may or may not be criticised or questioned. It does mean, however, that the parties and the community should have confidence that the system will, by and large, produce the right result.

In the end, it is the capacity and temperament of the judges which will gain this confidence and this respect. Quality is required, and recruitment of the best qualified candidates is necessary.

Being a judge is not for the enthusiastic amateur. It may be trendy and fashionable in certain circles to assert that it is not necessary to appoint experienced and capable barristers as judges, and that to do so is merely elitism. Claims are made for the appointment of academics, government lawyers, solicitors, and even laymen.

This is to mistake the process. The conduct of litigation is a complex task depending for orderly and consistent disposition upon many rules of practice, procedure and substantive law, and upon the interplay between them. It is only by years, and indeed decades, of day-to-day practical experience that these rules can be mastered sufficiently to confidently apply them to the myriad of factual situations which occur in actual cases.

In this state we are fortunate that there is a group of lawyers who elect to practise only as advocates. We do not need to depend upon part-time litigators.

This is not to say that a barrister is a better lawyer than a teacher or a

*Q.C., 1987 President of the N.S.W. Bar Association.

solicitor — it is to say that a barrister is a different lawyer than either.

It would be quite absurd to suggest that the senior heart surgeon at Royal Prince Alfred Hospital should be a general practitioner, a consultant physician, a general surgeon, or a teacher without a large and current practice in the field. If an academic or a solicitor has aspirations to appointment to the Bench, then he or she should do as many of their colleagues have very successfully done in the past — test and demonstrate suitability by full-time devotion to learning and practising the craft in circumstances where they can be compared with their peers; in short, come to the Bar.

It may be comforting for a lawyer to be cradled in the security of a university, a government department, a large corporation, or a firm of solicitors, but, if that career choice is made, that lawyer may develop considerable expertise, but cannot masquerade as a courtroom specialist or expert. To take any other view is to treat the litigants as guineapigs for untested and untried appointees.

Of course individual academics, corporate lawyers, government lawyers or solicitors may turn out to be adequate judges. Some have. However the chances of this happening are not high and it is certain that there will be a considerable amount of "on the job" training to the disadvantage of litigants. What is also certain is that the chances of a satisfactory appointment are far higher, and the risks to the system far less, if judges are drawn from those best qualified by experience. A consultant physician might turn out to be a good heart surgeon with some training, but the chances are not nearly as good as making a selection from amongst heart surgeons.

There is another important practical consideration of which one should not lose sight. Every appointment to the Bench which the profession regards as inappropriate makes appointment to the same Bench less attractive to those who really ought to be recruited. As I mention later, the economic terms and conditions of judicial appointment are well below "market" rates. Amongst the important factors attracting recruits to the Bench is the prestige and status — professional and public — attaching to the role. If a successful barrister sees a solicitor or a political appointee or a government lawyer or less qualified barrister appointed to the Bench this very much reduces his or her incentive to take appointment.

While appointment to the Bench is perceived to be a professional advancement and a professional honour, recruitment of those best qualified is possible notwithstanding unattractive economic terms and conditions. If not, recruitment will become very difficult.

A corollary of the necessity for excellence is that appointees to the Bench should be appointed on their own merits and not as representatives of any wider group. The best candidates should be appointed — not a woman, a member of a minority racial group, a labour lawyer, a young lawyer, an old lawyer, or any other form of representative appointment.

Why is it that there are signs that the status and prestige of the judiciary are declining? Whether we like it or not Australian society accords rank by reference to economic success. Judicial salaries are now pegged to that of

senior bureaucrats. A paper presented at the Australian Bar Association conference at Alice Springs last year by Mr Frank Jones, the Registrar of the High Court, graphically illustrated the steady but ultimately dramatic decline in the emoluments of judges compared with average earnings. To align salaries with those of senior bureaucrats also makes a statement about how the politicians perceive the judges. To be regarded as a functionary associated with the executive government is not attractive to a senior member of an independent profession. Furthermore, the skills which should constitute the equipment of a judge are in high demand, and earnings in various fields of endeavour are open to people with those capacities well in excess of judges' salaries, even taking into account benefits such as holidays, sabbatical leave and the like. Furthermore, the current workload of judges, and the pressure upon them to "get through the list", has greatly increased over recent years. In the past one of the attractions of the Bench was a less demanding lifestyle. This is increasingly untrue.

There is no doubt that the economic disadvantages of the Bench have played some part in the recent resignation of at least two judges of the Federal Court — a Court high in the judicial hierarchy. I do not comment upon the individuals concerned, but suggest that the fact should be recognized. At the moment, for a variety of reasons, there are at least seven former judges who are back in active practice in the profession, and there are a number of former judges who, whilst not in full-time practice, are engaged in activities such as arbitration. This in itself I am sure has an effect upon the public perception of the judiciary.

There is also no doubt that the proliferation of specialist courts and tribunals — many of them seeking to stress the "human face" of law — (and thus the fraility of the individual judges) has detracted from the prestige and status of the principal courts of the land, and in particular has detracted from the status of the State Supreme Courts.

It would also be foolish not to recognize that the controversy which has surrounded individual members of the judiciary over recent years has had its effect. I have no doubt that this controversy, the readiness of litigants and the press to ascribe stupidity, ignorance and worse to the judges; and, as far as New South Wales is concerned, the setting up of the Judicial Commission to act as a surveillance authority over judges, have very much reduced the attractiveness of the role. It has very much underlined the perception that a judge is just like any other public servant (not even a top public servant), rather than being part of one of three great arms of government — the legislature, the executive and the judiciary.

I fear that the delicate balance upon which community confidence in the administration of justice depends has been upset, and that the consequences for an orderly community are very worrying. It is easy for politicians and the press to prove their virility and pander to half-baked theorists by evidencing lack of respect for the judiciary. Some of this may be due to insensitivity rather than malice aforethought, but in either event the damage done to the judiciary ultimately damages the community.